



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 23, 1996

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
P. O. Box 850137
Mesquite, Texas 75185-0137

OR96-1525

Dear Ms. Guillen Graham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100234.

The City of Mesquite Police Department (the "city") received a request for all records pertaining to a particular police officer who was involved in an incident where an individual was shot by the police officer, resulting in the death of the individual. Specifically, the city received a request for the following information:

[A]ny and all performance records, internal affairs investigation records, qualification records, personnel records, criminal charges, civilian complaints, whether or not substantiated, all records pertaining to all disciplinary actions, whether or not action was taken, pertaining to Officer Jerry Valladarez, #519, Mesquite Police Department.

You submitted to this office for review the requested information and contend that the information is excepted from disclosure under sections 552.101, 552.102 and 552.103 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation "to which the state or a political subdivision is or may be

a party.”¹ The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated and that (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for the information to be excepted under section 552.103(a).

Litigation cannot be regarded as “reasonably anticipated” unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.*; see also Open Records Decision Nos. 555 (1990), 346 (1982). Additionally, in Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a “notice of claim” letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance or statute. However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

You assert that all of the information submitted is excepted from required public disclosure under section 552.103, based on anticipated litigation related to a wrongful death action against the city. The requestor in this instance is an attorney who represents the family of an individual shot by a police officer employed by the city. Additionally, the city has received a notice letter that states it is “in compliance with the Texas Tort Claims Act” from the requestor’s client alleging a wrongful death action. The notice of claim letter further advises the city that an attorney has been retained. Additionally, you assert that the city “has determined that great potential for litigation is present and that the release of any of the requested information . . . would be detrimental to the City in the preparation of its defense in this potential litigation.” Based on this evidence and review of the submitted documents, this office concludes that the city has established that litigation is reasonably anticipated² and that the requested information relates to the

¹Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 (1989) at 4.

²The city did not make an affirmative representation that the notice of claim letter complies with the requirements of the TTCA, and thus has not met the test set forth in Open Records Decision No. 638 (1996) to determine that litigation is reasonably anticipated. Nonetheless, this office finds that based on the specific facts in this situation, the city has provided sufficient evidence to establish that litigation is reasonably anticipated under section 552.103 of the Government Code. We note that if in the future you wish to assert that section 552.103(a) is applicable on the basis of the city’s receipt of a notice of claim

anticipated litigation. Therefore, you may withhold the requested information under section 552.103.³

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

However, we note that information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). For your convenience, we have included for your review a sampling of common types of information deemed confidential.

We note that the requested records contain information that may be excepted from disclosure under section 552.117(2). Section 552.117 excepts from disclosure:

information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024; or
- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code.

The city must withhold those portions of the records that reveal the officers' home addresses, home telephone numbers, and social security numbers. The city must also withhold the officers' *former* home address and telephone information from disclosure. See Open Records Decision No. 622 (1994).

(Footnote continued)

letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA.

³Because we find that you may withhold the requested information under section 552.103, we do not determine whether specific information may be withheld under sections 552.101 and 552.102 of the Government Code.

You also state that the City of Mesquite is a "civil service municipality." Therefore, section 143.089 of the Local Government Code is applicable. Specifically, in reference to the records you submitted to us for review which are part of the files maintained by the police department under section 143.089(g) of the Local Government Code, the city must withhold those records from disclosure under section 552.101 as information deemed confidential by statute.⁴ See Local Gov't Code § 143.089(g); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied); Open Records Decision No. 562 (1990) at 6. We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. See Gov't Code § 552.352.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref.: ID# 100234

Enclosures: Submitted documents
List of Confidential Information

cc: Mr. Gilbert Medina, Jr.
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(w/o enclosures)

⁴ We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. We also note that if an internal affairs investigation were to result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and is subject to release by the civil service commission under section 143.089(f) of the Local Government Code, unless it is excepted from disclosure under the Open Records Act. See Open Records Decision No. 562 (1990) at 6.